Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1994

LUIS OLIVEIRA, MILTON OLIVEIRA
AND ELIAS MORIERO,

Petitioners

v.

GEORGE MAYER, GREGORY TOMLIN, JOHN RAINONE,
JOHN F. SCALISE, LAURIE BRETTHAUER,
SEAN COONEY AND DOUGLAS ROBINSON,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err when it determined that the "reasonableness" of Respondents' actions for the purpose of qualified immunity was a question for the jury, after the court had already decided *as a matter of law* that an unlawful arrest of Petitioners took place?

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No._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

Luis Oliveira, Milton Oliveira and Elias Moreiro,

Petitioners

George Mayer, Gregory Tomlin, John Rainone, John F. Scalise, Laurie Bretthauer, Sean Cooney and Douglas Robinson,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Luis Oliveira, Milton Oliveira and Elias Moreiro, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in which the court correctly decided *as a matter of law* that Petitioners were unlawfully arrested by Respondents, yet incorrectly required that a jury decide the issue of whether Respondents were entitled to qualified immunity.

OPINION BELOW

The opinion of the Court of Appeals is reported as Oliveira v. Mayer, Docket No. 93-7813, slip op. 3709 (2d Cir. April 28, 1994) and appears in Appendix A of this Petition. The unpublished written opinion of the District Court for the District of Connecticut appears in Appendix B of this opinion.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on April 28, 1994. A timely Petition for Rehearing was filed by Respondent on May 11, 1994. The Court of Appeals' denial of the Petition for Rehearing was issued on June 16, 1994 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution is set forth in Appendix D. Title 42, U.S.C. §1983 is set forth in Appendix E.

STATEMENT OF THE CASE

On June 5, 1991 Petitioners, three black skinned men of Brazilian origin brought an action for false arrest,

intimidation, excessive force, and other Constitutional violations pursuant to 42 U.S.C. §1983 against the Police Department of the City of Stamford, Connecticut and seven named individual members of said department in the United States District Court for the Southern District of New York. By consent of the parties, on September 3, 1991, the action was transferred to the District Court for the District of Connecticut at Bridgeport.

The action arose on January 4, 1991 when a motorist observed Petitioners driving through an affluent neighborhood of North Stamford in an older model station wagon. The motorist called 911 after seeing one petitioner hand another a video camera within the car. He reported to 911 that suspicious persons were present in this affluent neighborhood. Based on this single, uncorroborated tip the Respondents followed Petitioners' car and ultimately formed a "V" formation behind Petitioners' car as it entered Interstate 95 southbound toward New York. Petitioners were ordered to exit the vehicle one at a time and ordered to kneel. Once kneeling, each Petitioner was handcuffed, laid over the hood of a car, frisked, and placed into the rear seat of a patrol vehicle. Each Petitioner was shackled, searched, hands cuffed behind his back and isolated. Respondents thoroughly searched Petitioners' vehicle and its contents as well as interrogated each Petitioner in separate police cars. At least one Petitioner was read his Miranda Rights. Petitioners were actually stone masons, residing in New Rochelle, New York, and had completed construction of a stone patio in the neighborhood where the motorist observed them. They used the video camera to record their completed construction project. After approximately forty minutes another police officer, dispatched to the neighborhood where Petitioners were first sighted,

confirmed that Petitioners' activities were legitimate. Petitioners were then released without any criminal process issuing.

On June 30, 1993 the District Court granted Petitioners' motion for a directed verdict against the Respondents on the issue of false arrest. The District Court ruled *as a matter of law* that Petitioners had been falsely arrested without probable cause. The District Court further ruled that reasonable police officers should have known that their actions on the facts of this case were not permitted under law. Thus, the Respondents were not entitled to the defense of qualified immunity. Each Petitioner was awarded $20,000 in compensatory damages. An additional $5,000 in punitive damages assessed in favor of each Petitioner against Respondent Gregory Tomlin, a captain and the ranking officer on the scene.

Respondents' motion for judgment N.O.V, or a new trial, filed July 15, 1993, was denied by the District Court on July 27, 1993. Respondents appealed to the United States Court Appeals for the Second Circuit on July 30, 1993. On April 28, 1994 the Court of Appeals for the Second Circuit, by Chief Judge Jon O. Newman affirmed in part and vacated in part the District Court's ruling and remanded the matter. The Court of Appeals concluded that the District Court correctly ruled as a matter of law that the Respondents had falsely arrested the Petitioners and in so doing did violate the Petitioners rights under the Fourth Amendment. The panel ruled, however, that the District Court erred in directing a verdict with respect to the defense of qualified immunity. This issue, according to the Court of Appeals, should have been submitted to the jury on the theory that even where a violation of Petitioners' Fourth

Amendment rights occurred as a matter of law, a reasonable jury could conclude that a reasonable police officer could believe as the Respondents claimed, that their actions were lawful. The Court of Appeals remanded the case to the District Court for a new trial on the issue of qualified immunity, leaving discretion to the District Court whether the jury should redetermine damages if it rejects Respondents' qualified immunity defense. Judge Mahoney dissented, opining that no *de facto* arrest had occurred.

REASONS FOR GRANTING THE WRIT

This appeal presents an aspect of the doctrine of qualified immunity never considered by this Court. There is a split among the circuit courts of appeal on this issue and the case at bar widens the divergence among the circuits by rejecting, at least impliedly, previous decisions of this Court.

We claim two errors occurred on appeal below when the Court ruled qualified immunity to be a jury question: Once the court affirmed that a Terry stop had not occurred *as a matter of law*, that finding was dispositive of the question of qualified immunity and the court's further analysis was in error. Second, assuming *arguendo*, that qualified immunity requires a separate, different analysis under these facts, it was error to require jury consideration of this question when, as here, the legal defense of qualified immunity can and should be decided by the court.

Finally, we argue that Anderson v. Creighton, 483 U.S. 637 (1987), as interpreted herein below, expands the qualified immunity defense to a point where it acts as an absolute prohibition on summary judgement and directed verdicts in favor of plaintiff's claim, under 42 U.S.C. §1983

(Appendix E). This expansion, coupled with the previous limitations attached to the exclusionary rule by this court, has essentially left the §1983 plaintiff without any redress.

The confusion the Second Circuit demonstrated in Oliveira v. Mayer, No. 93-7813 slip op. 3709 (April 28, 1994)(Appendix A) was caused by its reliance on Anderson v. Creighton, 435 U.S. 635 (1987), for the instruction that "reasonableness" for purpose of qualified immunity is a separate inquiry from a determination of "reasonableness" under the Fourth Amendment, thus requiring a separate fact specific inquiry into the circumstances at the time of the unlawful arrest. Since the court concluded that Respondents' actions as a matter of law did not constitute a Terry stop but an unlawful arrest, Petitioners argue it was unnecessary to make a second inquiry into qualified immunity. When deciding probable cause and qualified immunity there "lies a substantial, if not complete, overlap of the issue of immunity and the principal issue on the merits." Maxwell v. City of Indianapolis, 998 F.2d 431, 435 (7th Cir. 1993). In Maxwell, the Seventh Circuit disagreed with the police officers' argument that they were entitled to "arguable probable cause" because the determination of probable cause, "itself measured on a shifting scale is [not] independent from what an arresting officer could reasonably have known." Id. at 436. The Seventh Circuit in Maxwell already concluded that the actions of the police officer in arresting Maxwell were those that a jury could reasonably conclude that the police officers lacked probable cause. Id. at 435. Thus,

> [I]n effect, we have come full circle on the probable cause question. Because we have already established that the conclusion by the three officers concerning the existence of probable cause may be found to be objectively unreasonable, they are not entitled to qualified immunity at this juncture. Id. at 436.

By already determining that the police officers acted unreasonably under a probable cause inquiry, the court concluded that the officers did not act reasonably in light of clearly established law. Id. While this interpretation may seem to ignore the second chance at reasonableness allowed to officers under Anderson v. Creighton, [1] in effect, the

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[1] Anderson v. Creighton, 483 U.S. 635 (1987) (This court concluded that a person could act unreasonably under a Fourth Amendment inquiry of reasonableness resulting in a determination of a lack of probable cause, yet still act reasonably for purposes of qualified immunity). But cf. Oliveira v. Mayer, No. 98-7813, slip. op. p. 3709, 3722 (2d Cir. April 28, 1994)(Judge Newman notes his disagreement with the Anderson analysis that the immunity question differs from the probable cause question); Kathryn R. Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions For A Police Officer's Use of Excessive Force, 62 Temp. L. Rev. 61,88(1989)(Substituting "undue" for the word "unreasonable" will result in the "splitting of semantic hairs" trying to distinguish "undue" under the Fourth Amendment from "unreasonable" under qualified immunity.)

court in Maxwell conducted the inquiries simultaneously to determine that the police officers unreasonably violated clearly established law. This type of analysis would be more appropriate in the case at bar since by conducting the inquiry simultaneously the Court of Appeals would not have ended up with such an illogical result. Petitioners argue that by concluding as a matter of law that the police officers did not have "any reasonable grounds for believing, that the plaintiffs were armed or otherwise dangerous" thus the detention was not a Terry stop, Oliveira v. Mayer, No. 93-7813 slip op. at 3717(April 28,1994)(footnote omitted), the Court should have then concluded that the police officers unreasonably violated clearly established law, ending the inquiry[2].

The Second Circuit erred by requiring that on remand that the issue of qualified immunity be determined by the jury. In Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534, 536-537 (1991)(per curiam), this Court concluded that the Ninth Circuit incorrectly placed the issue of qualified

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[2]See also, Morgan v. Woessner, 997 F.2d 1244,1260 (9th Cir.), cert. dismissed, 114 S.Ct. 671 (Jan. 10, 1994)(Where the court stated "[t]hus, our conclusion that [the police officer] acted unconstitutionally as a matter of law is the end of our inquiry on qualified immunity"). In Morgan the court did go on to consider whether or not defendant could claim a "good faith belief" even though such a claim was never asserted by the defendant, but concluded that the lack of reasonable suspicion by the defendant precluded a finding that he could have believed that his conduct did not violate the law.

immunity in the hands of the jury by having the jury decide qualified immunity on a summary judgment motion unless no reasonable jury could conclude otherwise. "Immunity ordinary should be decided by the court long before trial". Id. The Second Circuit erred in the same way as the Ninth Circuit had in Hunter when it concluded that unless the factual dispute is so minimal that a jury could not conclude otherwise, in which case the court would decide the issue, qualified immunity should be decided by the jury. This error is especially apparent in the case at bar since the court already decided as a matter of law that an unlawful arrest took place. Thus the facts were not in dispute for a determination of unlawful arrest, yet became disputed for purposes of qualified immunity[3]. Such reasoning is in

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[3]Additionally, the Court of Appeals set out the facts in its "Background" section without mention of any factual disputes. Facts set forth in the "Background" section as undisputed suddenly are in dispute for purposes of qualified immunity. For example, the Court states "Though the Plaintiffs were at times slow to respond to the police officers' commands due to their limited mastery of English, they followed the officers' orders without resistance". Oliveira, at 3712. Nevertheless, in the Court's discussion of qualified immunity, the Court acknowledged a factual dispute as to the Petitioners' responsiveness to the Respondents' instructions. Id. at 3724. Respondents "guns were drawn or at the ready" for purposes of determining an unlawful arrest, yet "the defendant's use of their weapons" was disputed for qualified immunity. Id. at 3715, 3724.

direct contradiction to Hunter. Furthermore, this Court recognized in Mitchell v. Forsyth, 472 U.S. 511, 528 (1984), that the resolution of the issue of qualified immunity would at times require consideration of the facts to make this legal determination. While in Mitchell this Court only decided the issue of whether the defendant's actions violated clearly established law, the addition of the reasonableness inquiry under Anderson v. Creighton does not change the fact that qualified immunity is a question of law, even though it may include factual considerations.

> ...[E]ven though the ultimate resolution of the qualifiedimmunity question may implicate factual disputes in a particular case, it is the court that should make this qualified immunity determination, and not the jury. Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation §8.08 (2d ed. Supp. 1993).

Like in Mitchell, where this Court pointed to other situations in which a court must make factual determinations, including double jeopardy claims and instances where the court must determine whether a member of Congress who asserts her conduct falls within the Speech and Debate Clause is absolutely immune, Mitchell, at 528, so should it do the same under qualified immunity.

This Court declared in Hunter that the court should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable,

or more reasonable interpretation of the events can be constructed five years after the fact." 112 S.Ct. at 537. Thus, by delegating the power to the jury to make this determination as the court did in Oliveira, No. 93-7813 slip op. at 3724 (April 28, 1994)(Appendix A), the jury is placed in the improper position of making a legal determination which should be made by the court. By declaring a jury "could" reasonably conclude that it was objectively reasonable for the Respondents to believe as they did, Id., the Second Circuit opened the question to varying interpretations which the court should decide, not the jury.

While Hunter held that qualified immunity should ordinarily be decided by the court, 502 U.S. 224 (1991), it does not address how the issue should be determined when it is not decided on a summary judgment motion or when factual disputes remain. Currently, there is no uniform standard resolving assertions of qualified immunity. There is a division among the circuits that needs to be resolved by this Court. The Fifth Circuit has concluded that when factual disputes exist concerning the defense of qualified immunity, such as the case at bar, the issue of qualified immunity should be decided by the jury. See, Presley v. City of Penbrook, 4 F.3d. 405, 410 (5th Cir. 1993)(If the case goes to trial and there remain disputed issues of material fact, a properly instructed jury may decide the question of qualified immunity); Melear v. Spears, 862 F.2d 1177, 1184 (5th Cir. 1989)(If a case goes to trial the trier of fact must determine objective legal reasonableness of a police officer's conduct); See also, the Seventh Circuit opinion, Mahoney v. Kesery, 976 F.2d 1054, 1058-59 (7th Cir. 1992)(Where the court concluded since the only issue that needed to be resolved was whether a reasonable officer

would have thought the defendant committed a crime the jury should decide the issue since the jury's determination of probable cause "will automatically resolve both immunity and the merits"... "there is an argument that the jury might as well be allowed to decide [the question] with preclusive effect on the judge's determination of immunity"). The Second Circuit also ruled that when the facts were not undisputed qualified immunity was a question for the jury. Calamia v. City of New York, 879 F.2d 1025, 1036 (2nd Cir. 1989). However, in a case decided one year later, the Second Circuit concluded (as some other circuits had), that factual disputes should be decided by the jury in the form of special interrogatories, yet qualified immunity was held to be a legal question for the court. Warren v. Dwyer, 906 F.2d 70, 76 (2nd Cir. 1990) cert. denied, 111 S.Ct. 431 (1990). The court in Oliveira seems to ignore the import of Warren by citing to Calamia for its proposition that the jury should decide qualified immunity in factually disputed situations. The Second Circuit seems to be reverting back to the Calamia standard. Other circuits also send factual disputes to the jury but have the court decide qualified immunity. See, Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992) (Qualified immunity should be decided by the court and should not be submitted for decision by the jury. Factual disputes were sent to the jury in the form of special interrogatories); Gainor v. Rogers, 973 F.2d 1379, 1385 (8th Cir. 1992); Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992). The circuit courts are thus split as to how qualified immunity should be decided when factual disputes exist. It is an issue which needs to be addressed in order to assure uniformity throughout the federal system.

As evidenced by the case at bar, Anderson v. Creighton has created a host of problems not originally

anticipated by this court, both substantive and procedural. By allowing for separate inquiries into "reasonableness" under the Fourth Amendment and qualified immunity, Petitioners argue this court has created a situation in which the importance of the Fourth Amendment is seriously eroded. Justice Stevens, in his Anderson dissent, correctly argued that police officers are now given two chances at immunity while the citizen's interest is only counted once, affording far less weight to the individual than the Framers of the Fourth Amendment intended. 483 U.S. at 664 (1982)(Stevens, J., dissenting). In the case at bar, Respondents were actually given a third "bite at the apple". Not only did the Court of Appeals conclude that Petitioners were unlawfully arrested without probable cause, they also rejected Respondents argument that they reasonably believed they had probable cause to arrest Petitioners. However the court did allow Respondents to argue that they reasonably believed their actions constituted a Terry stop. Oliveira, at 3721. Under this double standard of reasonableness of Anderson, police officers are encouraged to err on the side against the individual as opposed to protecting the individual's rights. Furthermore, by allowing for this fact specific inquiry into the reasonableness of a police officer's beliefs in his particular set of circumstances, this Court has created a situation in which it is possible to establish continual new precedents with each fact pattern. Therefore, by refusing to create a bright line rule, this Court is promoting increased litigation and confusion. A whole new body of law will be required before plaintiffs in §1983 actions seeking summary judgments or directed verdicts can expect summary relief. In many situations, a defendant police officer could tailor his pleadings to reflect those of a reasonable police officer, thus creating a factual "mental state" issue even in situations plainly involving flagrant

illegality. As a result, factual disputes are more likely to occur, thereby preventing resolution of the issue at summary judgment and contradicting the intention of the qualified immunity doctrine that it is an immunity from suit. See, Mitchell v. Forsyth, 472 U.S. 511 (1984)("The entitlement is an immunity from suit, rather than a mere defense to liability"); See also, Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982)(where this Court eliminated the inquiry into the subjective intent of the officer since it often required "broad ranging" discovery and allowed insubstantial claims to proceed to trial).

As the doctrine of qualified immunity for police officers has evolved from Pierson v. Ray, 386 U.S. 547 (1967), to the present, one can argue that qualified immunity has essentially turned into absolute immunity. See, Stephen J. Shapiro, Public Official's Qualified Immunity in Section 1983 Action under *Harlow v. Fitzgerald* and its Progeny: A Critical Analysis, 22 U. Mich. J.L. Ref. 249, 252(1989); The Supreme Court, 1986 Term - Leading Cases, 101 Harv. L. Rev. 220 (1987)("Taken together, the Court's rulings [in Harlow and Anderson] extend to law enforcement officers a new layer of protection that threatens to increase the number of unremedied violations of the fourth amendment"). The case at bar exemplifies the result of this trend, evidenced by the fact that police officers who were found to be in clear violation of the law were still entitled to the defense of qualified immunity. Thus, Petitioners have been left with significantly less opportunity to be compensated for such a clear violation of their constitutional right to be free from illegal searches and seizures.

As §1983 plaintiffs have lost opportunities for remedies under the Fourth Amendment, there has been a

movement in this Court towards limiting if not abolishing the exclusionary rule as well. See eg., United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. at 348 (1974)) ("The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'") In United States v. Leon, this Court demonstrated a willingness to severely restrain the scope of the exclusionary rule. It allowed the admission of evidence based on good faith reliance upon an invalid warrant which lacked probable cause. Leon, at 921. This court claimed since the deterrent effect of the exclusionary rule was lacking in this instance, the evidence was admissible. Id. at 920. Thus, the exclusionary rule as a remedy for Fourth Amendment rights violations has been eliminated. See, James A. Adams, Search and Seizure as Seen by Supreme Court Justices: Are They Serious or is This Just Judicial Humor?, 12 St. Louis U. Pub. L. Rev. 413, 465 (1993).

While this Court has limited the exclusionary rule, at least one justice has promoted the view that since plaintiffs supposedly have available to them redress under 42 U.S.C. §1983, the private cause of action against government officers for constitutional violations is an effective alternative. See, California v. Minjares, 443 U.S. 916, 925-926 (mem.)(Rehnquist dissenting), 414 U.S. 887, denying cert. to 24 Cal. 3d. 410 (1979). This view is supported by some scholars as well who see the tort remedy as a practical alternative to the exclusionary rule or as the original intention of the fourth amendment framers. See, Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994); Richard A. Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases,

57 Wash. L. Rev. 635 (1982); Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447 (1978). However, as evidenced by Anderson v. Creighton, this Court has severely restricted the opportunity for redress under 42 U.S.C. §1983. Petitioners argue this restriction plus the movement to eliminate the exclusionary rule effectively abolishes any check that might currently exist on police officers and other public officials. Without this check, the Fourth Amendment essentially becomes meaningless and the rights of the individual become further subject to the whim of an increasingly powerful and intrusive constabulary.

The Court below erred in reserving the issue of qualified immunity for the jury after deciding as a matter of law that an unlawful arrest took place. Second, the resolution of the issue of qualified immunity is in conflict among the federal circuits. Lastly the "reasonableness" analysis promulgated by Anderson v. Creighton has created unnecessary confusion and severely restricted the rights of the individual under the Fourth Amendment which will be even further restricted if the trend of this Court continues. Petitioners pray that these issues be reassessed by this Court.

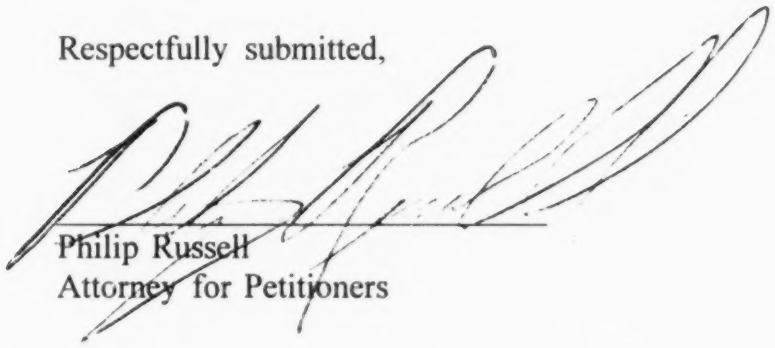
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals on this matter and to decide how qualified immunity should be decided when factual disputes exist after a trial has been conducted. Furthermore, this Court

should address the problems it created in its decision, Anderson v. Creighton, 483 U.S. 635 (1987).

Dated: September 7, 1994

Respectfully submitted,



Philip Russell
Attorney for Petitioners

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LUIS OLIVEIRA, MILTON OLIVEIRA
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PETITION FOR WRIT OF CERTIORARI TO THE
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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1013—August Term 1993

Argued: February 18, 1994 Decided: April 28, 1994

Docket No. 93-7813

LUIS OLIVEIRA, MILTON OLIVEIRA
and ELIAS MOREIRO,

Plaintiffs-Appellees,

—v.—

GEORGE MAYER, Chief, Stamford Police Department, GREGORY TOMLIN, Captain, Stamford Police Dept., JOHN RAINONE, OFFICER, Stamford Police Dept., JOHN F. SCALISE, Officer, Stamford Police Dept., LAURIE BRETTHAUER, Officer, Stamford Police Dept., SEAN COONEY, Officer, Stamford Police Dept., DOUGLAS ROBINSON, Officer, Stamford Police Dept.,

Defendants-Appellants,

KRISTAL WALKLEY, Sergeant, Stamford Police Dept.,

Defendant.

Before:

NEWMAN, *Chief Judge*,
CARDAMONE and MAHONEY, *Circuit Judges*.

Appeal from the July 7, 1993, judgment of the United States District Court for the District of Connecticut (T.F. Gilroy Daly, Judge) awarding plaintiffs compensatory and punitive damages in an action in which the plaintiffs' claimed violation of their Fourth Amendment rights.

Vacated and remanded. Judge Mahoney concurs in part and dissents in part with a separate opinion.

JAMES V. MINOR, Asst. Corp. Counsel, Stamford, Conn. (Daniel M. McCabe, Corp. Counsel, Stamford, Conn., on the brief), *for defendants-appellants.*

PHILIP RUSSELL, Greenwich, Conn. (Roy S. Ward, Russell & Wells, Greenwich, Conn., on the brief), *for plaintiffs-appellees.*

JON O. NEWMAN, *Chief Judge*:

This appeal primarily concerns the interplay, in the context of a jury trial, between the Fourth Amendment standards for making arrests and stops and the standard for allowing the defense of qualified immunity. Seven police officers for the City of Stamford, Connecticut, appeal from a judgment entered July 7, 1993, by the United States District Court for the District of Connecticut (T.F. Gilroy Daly, Judge) awarding plaintiffs Luis Oliveira, Milton Oliveira, and Elias Moreiro, $60,000 in compensatory damages and $15,000 in punitive damages. We hold that it was appropriate for the District Court to rule as a matter of law that the defendants' actions violated the

plaintiffs' rights under the Fourth Amendment. However, the District Court erred when it then directed a verdict rejecting the officers' defense of qualified immunity, as this issue should have been submitted to the jury. We therefore vacate the judgment for the plaintiffs and remand for a trial on the defendants' qualified immunity defense.

Background

On January 4, 1991, a private motorist spotted the plaintiffs, three dark-skinned males, handling an expensive video camera while driving in a dilapidated station wagon through an affluent area of North Stamford, Connecticut. Suspicious merely because the camera appeared quite valuable and because the vehicle had New York license plates and had emerged from a dead-end street, the motorist called the police from his car phone and reported that there may have been a burglary.

The Stamford Police Department dispatched many officers in response to the motorist's report. They quickly located what they correctly believed was the station wagon the motorist had reported, and six police cruisers formed a wedge around the plaintiffs' vehicle near a breakdown lane on Interstate 95. The police officers then followed "high-risk" or "felony" stop procedures. By loud-speaker, the plaintiffs were ordered to stop their vehicle, toss out the keys, and keep their hands outside the windows. With guns drawn, the police ordered the driver, Luis Oliveira, to leave the car, keep his hands above his head, and walk backwards toward them. Luis was then ordered to kneel, was handcuffed, was searched while spread over the hood of a car, and was placed into the rear of one of the police cruisers. The other two plaintiffs were similarly removed from the station wagon,

handcuffed, searched, and segregated. Though the plaintiffs were at times slow to respond to the police officers' commands due to their limited mastery of English, they followed the officers' orders without resistance.

After thoroughly searching the defendants, the police also searched the entire interior of the station wagon and the contents of a shoulder bag found in the vehicle. Each plaintiff was separately questioned and at least one was read *Miranda* rights. While questioned, the plaintiffs stated they had been working as masons in North Stamford, but they could not provide an exact location or identify their employer. Luis Oliveira provided the police with a phone number, which was called, but the person that answered did not speak English. About 30 minutes after the plaintiffs were stopped, other officers completed a canvass of the neighborhood where the plaintiffs had initially been spotted and found no signs of a burglary, at which point the plaintiffs were released.

The plaintiffs thereafter initiated the instant suit under 42 U.S.C. § 1983 (1988) against all the police officers who were on the scene when the plaintiffs were detained. In the course of a jury trial, the participants in the incident testified concerning the details of the plaintiffs' detention, and each side presented expert testimony concerning police procedures. After the plaintiffs had presented their case, the District Court denied the defendants' motion for a directed verdict. At the close of all the evidence, the District Court granted the plaintiffs' motion for a verdict on the issue of liability. The Court ruled as a matter of law that the plaintiffs had been subjected to an arrest and that the defendants did not have probable cause for the arrest. The Court further ruled as a matter of law that the police officers were not entitled to qualified immunity because no reasonable officer could have believed that the

defendants' actions were lawful. The jury was thus charged only as to damages, and it awarded each plaintiff $20,000 in compensatory damages generally and $5,000 in punitive damages from Captain Gregory Tomlin. The District Court entered judgment for the aggregate amount of $75,000 and subsequently rejected the defendants' motions for judgment n.o.v. or a new trial.

Discussion

I. Lawfulness of the Detention of Plaintiffs

A. *Arrest or* Terry *Stop?* The District Court ruled as a matter of law that the plaintiffs had been arrested. The Court explained:

> [S]ix police officers in six vehicles (1) drew their weapons on three plaintiffs with no reasonable basis to assume they were armed other than the nature of the possible crime committed, (2) required them to kneel or lie down after ordering them out of the car, (3) kept the plaintiffs in handcuffs even after they were patted down and placed in separate squad cars, (4) searched the wallet of one plaintiff, (5) informed that plaintiff of his *Miranda* rights and interrogated him in the back of the squad car, and (6) searched the vehicle far beyond the scope permitted under *Terry [v. Ohio*, 392 U.S. 1 (1968)] . . . . [T]he Court finds that no reasonable juror could find other than that plaintiffs were arrested.

The defendants do not dispute the facts upon which the District Court relied to rule as a matter of law that the plaintiffs had been arrested. Rather, the police officers contend generally that they acted reasonably under the circumstances, and they claim that they detained the

plaintiffs no longer and treated the plaintiffs no harsher than necessary to dispel the suspicions raised by the motorist's report. The defendants seem to suggest that their detention of the plaintiffs was not an arrest but a permissible *Terry* stop, *see Terry v. Ohio*, 392 U.S. 1 (1968), supportable on the basis of the police officers' reasonable suspicions.

In *United States v. Perea*, 986 F.2d 633 (2d Cir. 1993), this Court recently elaborated the factors central to determining whether an encounter between the police and a suspect is an arrest or merely a *Terry* stop. Specifically, we explained that the pertinent considerations include

> the amount of force used by police, the need for such force, and the extent to which the individual's freedom of movement was restrained, . . . and in particular such factors as the number of agents involved . . . ; whether the target of the stop was suspected of being armed . . . ; the duration of the stop . . . ; and the physical treatment of the suspect . . . , including whether or not handcuffs were used.

Perea, 986 F.2d at 645 (citations omitted); *see also Posr v. Doherty*, 944 F.2d 91, 98 (2d Cir. 1991) ("Whether a seizure is an arrest or merely an investigatory detention, depends on the reasonableness of the level of intrusion under the totality of the circumstances."). In a section 1983 action, it would usually be a jury's task to decide whether a detention amounted to a *de facto* arrest, since "[t]he issue of precisely when an arrest takes place is a question of fact." *Posr*, 944 F.2d at 99. Here, however, the District Court decided as a matter of law that an arrest had been made. On appeal, we must view the evidence, as the District Court was obliged to view it, in the light most favorable to the defendants in order to determine whether

"there can be but one conclusion as to the verdict that reasonable [jurors] could have reached." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 359 (2d Cir. 1992) (internal quotations omitted), *cert. denied*, 113 S. Ct. 2445 (1993).

We agree with the District Court that reasonable jurors could only find that plaintiffs were arrested. This Court has repeatedly ruled that an arrest has occurred in encounters that were much less intrusive than what occurred here. *See, e.g., United States v. Moreno*, 897 F.2d 26, 31 (2d Cir.), *cert. denied*, 497 U.S. 1009 (1990); *United States v. Levy*, 731 F.2d 997, 1000-01 (2d Cir. 1984); *United States v. Marin*, 669 F.2d 73, 81-82 (2d Cir. 1982); *United States v. Ceballos*, 654 F.2d 177, 181-84 (2d Cir. 1981). The various elements of the plaintiffs' detention, especially when viewed collectively, would not permit a reasonable juror to conclude that the plaintiffs were merely subjected to a *Terry* stop: (a) the plaintiffs were boxed-in by six police vehicles and outnumbered two-to-one by officers with their guns drawn or at the ready, *cf. United States v. King*, 990 F.2d 1552, 1562-63 (10th Cir. 1993) (brandishing of gun and encircling of suspect's car amounted to an arrest); *United States v. Novak*, 870 F.2d 1345, 1351-53 (7th Cir. 1989) ("full-fledged arrest" when suspect surrounded by six or more officers with one gun drawn); *United States v. Robertson*, 833 F.2d 777, 780-82 (9th Cir. 1987) (detention of suspect at gunpoint by at least seven officers was an arrest); (b) the plaintiffs were forcefully ordered from their vehicle, harshly handled, and kept in handcuffs for the duration of the detention, *cf. United States v. Codd*, 956 F.2d 1109, 1111 (11th Cir. 1992) (seizing and handcuffing of suspect for extended period constituted an arrest); *United States v. Del Vizo*, 918 F.2d 821, 824-25 (9th Cir. 1990) (arrest occurred when suspect ordered from vehicle at gunpoint, forced to

lie on ground, and then handcuffed); (c) the plaintiffs were placed in separate police cruisers and questioned, and at least one plaintiffs was read *Miranda* rights, *cf. United States v. Richardson*, 949 F.2d 851, 856-58 (6th Cir. 1991) (placement of suspect in police cruiser turned detention into an arrest); *United States v. Thompson*, 906 F.2d 1292, 1297 (8th Cir.) (same), *cert. denied*, 498 U.S. 989 (1990); and (d) the defendants extensively searched the plaintiffs, their vehicle, and the contents of a bag found inside the vehicle, *see Ybarra v. Illinois*, 444 U.S. 85, 92-94 (1979) (explaining that a *Terry* stop permits only a limited search for concealed weapons when officer reasonably believes the detainee poses a threat).

Standing alone, no single factor would necessarily convert the plaintiffs' detention from a *Terry* stop into a *de facto* arrest. Indeed, courts have occasionally concluded that a particular detention was a permissible *Terry* stop even though it involved a few of the intrusive elements present in this case. *See, e.g., United States v. Perdue*, 8 F.3d 1455, 1462-63 (10th Cir. 1993) (finding *Terry* stop when armed officers ordered suspects to exit their car and to lie on the ground; noting, however, that detention "border[ed] on an illegal arrest"); *see also* Katherine L. Pringle et al., Project, *Twenty-Second Review of Criminal Procedure*, 81 Geo. L.J. 853, 884-87 (1993) (listing cases). For example, in *Dempsey v. Town of Brighton*, 749 F. Supp. 1215 (W.D.N.Y. 1990), *aff'd without opinion*, 940 F.2d 648 (2d Cir.), *cert. denied*, 112 S. Ct. 338 (1991), a case the defendants rely heavily upon, a district court held that a 20-minute detention involving similar "felony-stop" procedures was not an arrest but "was an investigatory stop based on articulable facts [that], as a matter of law, was reasonable." 749 F. Supp. at 1221.

Yet, the defendants do not cite and we have not discovered a single case in which a court found a detention that involved numerous intrusive elements, with little or no reasonable justification, to be a *Terry* stop. In *Dempsey*, for example, the suspects were handcuffed only briefly and the police only conducted a pat-down frisk for weapons. Further, in *Dempsey*, the police conclusively knew that an *armed* robbery had taken place. *See* 749 F. Supp. at 1218-19. Indeed, whenever this Court and other circuits have found an intrusive detention to be only a *Terry* stop, the police have always had a reasonable basis to believe the suspect was armed or otherwise dangerous, *see, e.g., United States v. Alexander*, 907 F.2d 269, 272 (2d Cir. 1990), *cert. denied*, 498 U.S. 1095 (1991); *United States v. Nargi*, 732 F.2d 1102, 1106-07 (2d Cir. 1984); *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993); *Courson v. McMillian*, 939 F.2d 1479, 1495-96 (11th Cir. 1991); *United States v. Alvarez*, 899 F.2d 833, 838-39 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991); *United States v. Seelye*, 815 F.2d 48, 50 (8th Cir. 1987). In this case, the defendants have not suggested, nor did they have any reasonable grounds for believing, that the plaintiffs were armed or otherwise dangerous.[1]

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[1] The defendants note that "often burglars are armed or have stolen handguns from the house that they burglarized." The defendants thus seem to suggest that the mere fact that the plaintiffs were suspected of burglary provided the police with a reasonable fear that they were armed and dangerous. However, suspecting a person of having committed a burglary cannot, in and of itself, provide police with grounds to subject that person to an extremely intrusive *Terry* stop. *See Ceballos*, 654 F.2d at 184 (noting that though narcotics traffickers are often very dangerous, "that generalization, without more, is insufficient to justify [an] extensive intrusion").

When we consider (1) the numerous oppressive elements of the encounter between the police and the plaintiffs, (2) the limited evidence that there was a crime, and (3) the absence of any indication the plaintiffs were armed or dangerous, we must conclude, as a matter of law, that the plaintiffs were subjected to a "degree of restraint [that] was too intrusive to be classified as an investigative detention." *Perea*, 986 F.2d at 645 (internal quotations and citations omitted). The District Court properly directed a verdict on the arrest issue.

B. *Probable Cause*. The District Court also ruled as a matter of law that the defendants did not have probable cause to arrest the plaintiffs. Arguing that at the very least this issue should have gone to the jury, the defendants point to cases suggesting that probable cause can be established based on a single witness's complaint, *see Torchinsky v. Siwinski*, 942 F.2d 257, 261-62 (4th Cir. 1991); *Grimm v. Churchill*, 932 F.2d 674, 675 (7th Cir. 1991), and that probable cause is generally a jury question in damage actions, *see Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 438 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987).

Information about criminal activity provided by a single complainant can establish probable cause when that information is sufficienctly reliable and corroborated. *See generally Alabama v. White*, 496 U.S. 325, 328-31 (1990); *United States v. Wagner*, 989 F.2d 69, 72-74 (2d Cir. 1993). Yet, even if bystander witnesses are considered presumptively reliable, a report of a crime alone will not necessarily establish probable cause. *See, e.g., Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991) (before they could lawfully arrest suspect, "police officers had a duty to conduct an investigation into the basis of the witness' report"); *see also United States v. Walker*, 7 F.3d

26, 30-31 (2d Cir. 1993) (telephone tip needs to possess sufficient indicia of reliability to support even a reasonable suspicion of criminal activity), *cert. denied*, 114 S. Ct. 1201 (1994); *United States v. Cutchin*, 956 F.2d 1216, 1217-18 (D.C. Cir. 1992) (without sufficient indicia of reliability or corroboration, call to 911 could not alone provide even the reasonable suspicion needed to justify an investigatory detention); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) ("Reasonable avenues of investigation must be pursued [to establish probable cause] especially when, as here, it is unclear whether a crime had even taken place."). Significantly, when information furnished by a single complainant suffices to establish probable cause, such information often comes from the victim, who has provided specific details of the crime. *See Torchinsky*, 942 F.2d at 262; *Grimm*, 932 F.2d at 675.

Notably, this case does not involve an alleged victim or even an eye-witness providing facts and details that, if true, would indicate or even reasonably suggest that a crime had taken place. Rather, as the defendants' conceded at oral argument, the observations of the plaintiffs' actions made by the motorist who alerted the police would not have supported a finding of probable cause if those observations had been made by police officers. A citizen's observations do not acquire enhanced value toward establishing probable cause simply because they are relayed to the police. We would have a different case if the plaintiffs had been observed surreptitiously removing items from a home. But here, all that was observed was one occupant of a vehicle that appeared to be of low value with what appeared to be a somewhat expensive item of personal property. That is not "reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to

be arrested." *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992).

The plaintiffs were entitled to a directed verdict holding that the defendants' actions violated their rights under the Fourth Amendment. This determination, however, does not resolve the defendants' assertion of qualified immunity, to which we now turn.

II. Qualified Immunity

As a general rule, police officers are entitled to qualified immunity if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights. *See, e.g., Ying Jing Gan v. City of New York*, 996 F.2d 522, 531-32 (2d Cir. 1993); *Golino*, 950 F.2d at 870. In the pending case, the District Court ruled as a matter of law that the defendants were not entitled to qualified immunity because "the law [was] clearly established" and "no reasonable officer would believe that the [defendants'] conduct was proper in the absence of probable cause." Though the Court's first basis for rejecting the immunity defense was correct, we conclude that the second basis improperly removed from the jury a disputed issue as to which reasonable jurors could find in the defendants' favor.

The right not to be arrested in the absence of probable cause is undoubtedly well-established. *See Soares v. State of Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993). It was also clearly established in January 1991 that an unreasonably intrusive detention could not be justified as a *Terry* stop and thus would need to be supported by probable cause. *See Florida v. Royer*, 460 U.S. 491, 500 (1983); *see also Perea*, 986 F.2d at 644-45 (explaining that a detention

using means more intrusive than necessary constitutes an arrest that must be supported by probable cause); *Alexander*, 907 F.2d at 272-73 (same).

Whether it was objectively reasonable for the defendants to believe that they were not violating the plaintiffs' rights is a closer question. The police present two grounds for such a claim here. First, they claim that they reasonably believed that they had probable cause to arrest the plaintiffs. Second, and somewhat more plausibly, they claim that they reasonably believed that their actions constituted only a permissible *Terry* stop based on reasonable suspicion. The District Court implicitly rejected both claims in rejecting the qualified immunity defense as a matter of law.

It is not surprising that the District Court, after ruling as a matter of law that the officers' conduct was unlawful, also ruled as a matter of law that it was objectively unreasonable for the officers to believe that their conduct was lawful. At first blush, the two rulings appear to involve the same question—whether the officers' conduct was objectively reasonable. Indeed, there is a seeming circularity to inquiring first whether the circumstances as perceived by a reasonably prudent police officer would justify the belief that the persons to be arrested had committed a crime, and, after finding that the circumstances would not justify such a belief, proceeding to inquire whether a police officer could reasonably believe that the officer's conduct was lawful. It is not readily apparent how a police officer could have an objectively reasonable belief that conduct was lawful when the unlawfulness of that conduct rests on a determination that an objectively reasonable police officer would not have acted. And the situation is especially perplexing in a case like the pending one where, for purposes of removing the first issue

from the jury, it has been determined, correctly in our view, that no reasonable juror could fail to find that the officer's conduct was unlawful.

Nevertheless, we have been authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immunity. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court considered and rejected the contention that it is not possible to say that "one 'reasonably' acted unreasonably." *Id.* at 643. The Court invoked its prior precedent of *Malley v. Briggs*, 475 U.S. 335 (1986), *see Anderson*, 483 U.S. at 643, and also argued that the reasonableness component of the lawfulness standard could as well be served by a concept that avoided the word "reasonable" and instead used the word "undue." *Id.*[2] The result of the distinction between reasonableness

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2 With respect, the writer is not wholly persuaded by the Court's explanation. Of course, the Fourth Amendment could be expressed in terms of what is "undue" rather than what is "unreasonable." But if courts then determined the meaning of "undue" in a particular case by asking whether a reasonably prudent police officer would have acted under the circumstances, the anomaly of thinking of the immunity defense as a different question would remain.

The Court further developed its explanation by pointing out that "the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable, so that the Creighton's objection, if it has any substance, applies to the application of *Harlow* generally." *Anderson*, 483 U.S. at 643-44 (referring to the general rule set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), that public officials are entitled to qualified immunity when their conduct is objectively reasonable). However, the determination of a reasonable accommodation between governmental need and individual freedom for purposes of determining the constitutional reach of most civil-liberties guarantees is normally made exclusively by judges, ultimately the justices of the Supreme Court. By contrast, the accommodation appropriate for application of the Fourth Amendment has already been determined by judges

as a component of a Fourth Amendment violation and reasonableness as a component of an immunity defense is that an officer is protected in some circumstances even when he "mistakenly conclude[s] that probable cause is present," *id.* at 641, *i.e.*, when he reasonably believes that a reasonably prudent police officer would have acted even though a reasonably prudent police officer would not have acted.

With the reasonableness inquiries thus separated, the question remains in this case whether the immunity issue required decision by the jury even though the lawfulness issue did not. Though "[i]mmunity ordinarily should be decided by the court," *see Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991), that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required, *see, e.g.*, *Frank v. Relin*, 1 F.3d 1317, 1328 (2d Cir.), *cert. denied*, 114 S. Ct. 604 (1993); *Ying Jing Gan*, 996 F.2d at 532; *see also Hurlman v. Rice*, 927 F.2d 74, 78 (2d Cir. 1991). Of course, as with any issue of nominally disputed fact, if the state of the evidence is such that reasonable jurors could reach only one conclusion, then that factual

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to include the objectively reasonable determination that would be made in each case by a prudent police officer. It is this component of the constitutional standard that makes so anomalous the further immunity inquiry into the objective reasonableness of the officer's belief in the lawfulness of the officer's conduct.

The distinction between reasonableness for Fourth Amendment lawfulness and reasonableness for qualified immunity has also been explained as resting on "the less stringent reasonable man standard of the tort action against governmental agents." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1348-49 (2d Cir. 1972) (on remand from Supreme Court) (Lumbard, J., concurring). *See generally* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 460-61 (1978).

issue is appropriate for decision by the court as a matter of law. Thus, the question on review is whether, viewing the evidence in the light most favorable to the police officers, a jury could reasonably conclude that it was objectively reasonable for the defendants to have believed that their detention of the plaintiffs was lawful.

In light of this standard, we think the District Court erred by not submitting the qualified immunity issue to the jury. Though we have decided as a matter of law that the plaintiffs were arrested and this arrest was without probable cause, these holdings do not necessarily mean that it would be unreasonable for a jury to conclude it was objectively reasonable for the police to believe that their detention of the plaintiffs was only a *Terry* stop or that they possessed probable cause to make an arrest. *See Warren v. Dwyer*, 906 F.2d 70, 75 (2d Cir.) (noting that questions of lawfulness and immunity are distinct), *cert. denied*, 498 U.S. 967 (1990).

Significantly, the trial before the District Court revealed some factual disputes concerning various aspects of the encounter between the police and the plaintiffs. Specifically, there were conflicting accounts of the total duration of the detention, the plaintiffs' responsiveness to the police's instructions, the physical treatment of the plaintiffs once removed from their vehicle, the defendants' use of their weapons, and a number of other particulars. These disputes bear directly upon whether it was objectively reasonable for the officers to believe that they were acting lawfully. *See Calamia v. City of New York*, 879 F.2d 1025, 1036 (2d Cir. 1989) (factual dispute entailed that jury should answer whether it was objectively reasonable for officer to believe he did not violate plaintiff's rights). The District Court should have let the jury (a) resolve these factual disputes and (b) based on its findings, decide

whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law when they detained the plaintiffs.[3]

Conclusion

We affirm that part of the District Court's directed verdict ruling that as a matter of law the defendants violated the plaintiff's rights under the Fourth Amendment. We reverse that part of the directed verdict ruling that as a matter of law the defendants were not entitled to qualified immunity. We therefore vacate the judgment and remand for a new trial at least on the issue of qualified immunity. We leave it to the discretion of the District Court whether the jury considering the immunity issue should also redetermine the amount of damages in the event that it rejects the immunity defense.

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[3] Crediting the defendants' version of the encounter, as we must on appeal, we find in particular that a reasonable jury could conclude that it was objectively reasonable for the defendants to believe that they were conducting only a *Terry* stop. According to the police officers' account, they detained the plaintiffs less than twenty minutes and they acted quickly to verify whether a burglary had been committed. Though the harsh treatment of the plaintiffs during the detention precludes a finding that the defendants in fact conducted only a *Terry* stop, the defendants' diligent efforts to confirm or dispel their suspicions would permit a reasonable jury to find that the police reasonably believed that they only conducted a *Terry* stop. *Cf. United States v. Sharpe*, 470 U.S. 675, 686-88 (1985) (20-minute detention was a *Terry* stop when police diligently investigated their suspicions).

MAHONEY, *Circuit Judge, concurring in part and dissenting in part.*

I agree with my colleagues that the judgment of the district court must be vacated and remanded. In my view, however, it was erroneous to direct a verdict on any aspect of this case, and not just on the defense of qualified immunity. I accordingly join in the majority opinion to the extent that it vacates the ruling of the district court as to qualified immunity, but respectfully dissent from that opinion insofar as it leaves undisturbed the balance of the district court's directed verdict in behalf of plaintiffs. I would vacate the district court's judgment *in toto* and remand for a new trial on all issues.

In saying this, I am of course aware that the Supreme Court has made it clear that a somewhat different standard applies to the issues of probable cause and qualified immunity. Thus, it is possible to find, as the majority does in this case, that a jury issue is presented as to qualified immunity, but not as to probable cause. I disagree, however, with the majority's reading of the record in this case to reach that result.

It seems clear that the initial stop of the plaintiffs was a *Terry* stop, and I do not understand the majority to view the matter differently. The complaining witness testified that he suspected a burglary, remained in telephone contact with the police dispatcher, and pursued the vehicle in which the plaintiffs were apparently departing from Stamford. This scenario provided reasonable suspicion for a *Terry* stop. *See* 3 Wayne R. LaFave, *Search and Seizure* § 9.3(e), at 479 & n. 313 (1987 & Supp. 1994) (collecting cases). Indeed, plaintiffs' expert witness testified that the stop was justified.

The fact that the plaintiffs' car was blocked by a number of police vehicles, and that the police approached the stopped vehicle with guns drawn, does not change the analysis. In *United States v. Perea*, 986 F.2d 633 (2d Cir. 1993), where "[g]overnment cars . . . blocked [a] cab in front and back and on one side, and the agents approached the cab, some with guns drawn," *id.* at 636, we nonetheless "note[d] our agreement with the district court's ruling that the initial stop of the livery cab was not an arrest but rather a *Terry* stop." These are obvious precautions to avert a high speed chase or a possible shootout, with all their attendant dangers to both the participants and the general public.

The majority maintains, however, that (1) the situation evolved into an arrest, (2) there was no probable cause for the arrest, and (3) both of these propositions are so clearly correct that they were properly taken from the jury. The conclusion that an arrest occurred is mandated, we are told, because of "(1) the numerous oppressive elements of the encounter between the police and the plaintiffs, (2) the limited evidence that there was a crime, and (3) the absence of any indication the plaintiffs were armed or dangerous." Similarly, no jury could rationally find probable cause for an arrest, we are advised, because "all that was observed was one occupant of a vehicle that appeared to be of low value with what appeared to be a somewhat expensive item of personal property."

The "oppressive" elements of the encounter involve, as the majority seems to acknowledge, fairly standard "felony stop" procedures. If there is a basis to detain a suspect, the detention does not become an arrest simply because the suspects are handcuffed. *See Dempsey v. Town of Brighton*, 749 F. Supp. 1215, 1223 (W.D.N.Y. 1990), *aff'd mem.*, 940 F.2d 648 (2d Cir.), *cert. denied*,

112 S. Ct. 338 (1991). Moreover, "a person is not under arrest simply because he is placed in a police patrol car." *Id.* (citing *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988)).

In addition, the relative brevity of the detention argues against the conclusion that there was an arrest. *See United States v. Sharpe*, 470 U.S. 675, 688 (1985) ("We reject the contention that a 20-minute stop is unreasonable when the police have acted diligently and a suspect's actions contribute to the added delay about which he complains."). The detention in this case might have been insignificantly brief but for the plaintiffs' inability to respond to police commands, or provide either the name of the person who employed them for masonry work or the address at which it was performed. And when the plaintiffs provided the police with a telephone number that would resolve their identification, the person who answered the phone could not speak English.

Nor do I agree with the majority's assessment of the evidence of (1) criminality, or (2) the prospect that the plaintiffs might be armed and dangerous. As to the latter, the police were fully justified in executing "felony stop" procedures that assume the possibility that persons reasonably suspected of a burglary are armed and dangerous. The alternatives are to forgo the *Terry* stop, or to execute it on the basis of necessarily limited information without taking "felony stop" precautions, and hope for the best. I don't regard either option as a constitutional requirement.

The issue of the evidence of criminality coalesces with the question of probable cause. The majority regards this evidence as limited to observation of "one occupant of a vehicle that appeared to be of low value with what

appeared to be a somewhat expensive item of personal property." This apparently refers to what the complainant knew, in which event the assessment disregards the complainant's testimony that: (1) his mother lived very near the dead end street from which the plaintiffs' vehicle emerged; (2) the complainant had been brought up in that neighborhood; (3) he knew of a number of recent burglaries in the neighborhood by cars bearing New York license plates; (4) he knew the plaintiffs were not residents of the neighborhood; and (5) the fact that they were driving a station wagon, rather than a workman's truck, dissuaded him from believing that they had been working in the neighborhood.

Of course, all this information cannot be attributed to the police, for there is no evidence that they were privy to it. There is evidence, however, that very shortly after the plaintiffs were detained, they provided, as an exculpatory explanation for their presence on the dead end street, the claim that they were building a wall at an address on the street that they could not specify for an employer whom they could not name. These improbable assertions, especially viewed in the context of the initial complaint, are strongly conducive to a finding of probable cause. *Cf. United States v. Moreno*, 897 F.2d 26, 31-32 (2d Cir. 1990).

In any event, after being provided with this implausible account, the police promptly investigated the neighborhood of the alleged burglary and interviewed the complainant. As a result, the plaintiffs were released in a matter of minutes thereafter.

The majority opinion does not specify precisely when, in its view, an arrest occurred. A reasonable jury could conclude, however, that the plaintiffs' apparent inability

to explain their presence in the neighborhood, together with the complainant's report of a suspected burglary, resulted in a police perception of probable cause very early in the course of the plaintiffs' detention. Alternatively, a reasonable jury could conclude that the *Terry* stop did not evolve into an arrest during the quite limited period when the plaintiffs were detained and the police undertook an investigation that resulted in the plaintiffs' release. I accordingly disagree with my colleagues' ruling that both of these issues were properly taken from the jury.

The observations of the Supreme Court in *Sharpe* seem especially apt for this occasion:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. . . . The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

897 F.2d at 686-87 (citations omitted).

In my view, both the district court ruling on liability and the majority opinion in this court constitute unwarranted exercises of the sort of 20-20 hindsight that *Sharpe* disparages. I would vacate and remand for a trial of all the issues in this case.

APPENDIX B

TRANSCRIPT TAKEN FROM

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LUIS OLIVEIRA, et al,	)	
Plaintiffs,	)	CASE 5:91CV633(TFGD)
	)	
v.	)	JUNE 29, 1993
	)	
GEORGE MAYER, et al,	)	
Defendants.		

DIRECTED VERDICT

915 Lafayette Boulevard
Bridgeport, Connecticut

TRIAL BY JURY

B E F O R E:

THE HONORABLE T.F. GILROY DALY, U.S.D.J.

A P P E A R A N C E S:

For the Plaintiff: PHILIP RUSSELL, ESQUIRE

For the Defendants: MICHAEL CLEAR, ESQUIRE
JAMES MINOR, ESQUIRE

Court Reporter: Martha C. Montelongo, RPR-CM
915 Lafayette Boulevard
Bridgeport, Connecticut

THE COURT: All right. I have thought about it. I find no evidence from which this jury, or any reasonable juror, could conclude that there was probable cause either to search the car to the extent it was searched, or to arrest the Defendants, the suspects at that time and the Plaintiffs now, or any of the three men.

The search of the car was unreasonable under any standard that I'm aware of since you cannot search it other than for bodies. They had a right to look for other people. They can do that in this car which was a station wagon on the evidence and, therefore, had no trunk as such. If it had a place for a spare tire there's no evidence they even looked in there, place under the floor. So that search could have been done from visually outside the car, done visually from outside the car and normally is done that way, but anyway could have been here.

And on the facts of this case, anything beyond that, there was nothing in plain view, anything beyond that was beyond what's permitted by the law. What occurred here, and the policy may be an all right policy, I don't have to address myself to that and I'm not going to, at least we're getting things started on some sort of a citizen observation. But it went beyond that on the facts of this case, way beyond it. And I only deal with the facts of the case that's in front of me. And it seems to me there's no question that under the totality of the circumstances this became an arrest, as I understand the evidence, and I don't think there is any dispute about it.

There were at least six vehicles there. There were probably more than six policemen there, police people

there. Guns were drawn, handcuffs were used, they were forced to kneel down. Whether or not anyone was forced to lie down, there's no dispute they were forced to kneel down. They were separated and placed in separate cruisers in custodial circumstances. They were not free to leave under any set of circumstances, and nobody claims that they were on the record.

And that detention, though not prolonged, was for at least for half an hour. They were given their Miranda warnings, and that's not normally done in investigative stop situations. The situation under the totality of the circumstances here were tantamount to a formal arrest, and that required probably cause. And that, in my judgment, was lacking on this record as a matter of law. And, accordingly, any force that was used, and force was used, is excessive because the arrest should not have been affected, and, therefore, no force should have been used in connection with that.

So judgment enters on those matters as a matter of law on liability for the Plaintiffs, and for each of them.

As I say, the policy which has been allowed and encouraged on this record without dispute by the Stamford Police Department and apparently with some pride, is what creates the situation that faces us now, and, therefore, under Monell, the city is liable. And judgment enters there as a matter of law.

The policy on the facts in this case was unconstitutional in its application. And as of 1991, January 4th, a reasonable police officer should have known that what they did on the facts of this case at the scene of this

incident was not permitted under law, and therefore, there is no good faith defense as a matter of law and I so rule.

CERTIFICATE

I, Martha C. Montelongo, RPR-CM, hereby certify that the foregoing pages are a complete and accurate transcription of my original stenotype notes taken in the matter of Luis Oliveira, et al vs. George Mayer, et al, which was held before the Honorable T.F. Gilroy Daly, U.S.D.J., at 915 Lafayette Boulevard, Bridgeport, Connecticut, on June 30, 1993.

/s/ Martha C. Montelongo
Martha C. Montelongo, RPR-CM
Official Court Reporter

APPENDIX C

Taken from:

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of June, One Thousand Nine Hundred and Ninety-Four.

LUIS OLIVEIRA, MILTON OLIVEIRA, and ELIAS MORERIO,

Plaintiffs-Appellees

v. DOCKET NUMBER 93-7813

GEORGE MAYER, Chief, Stamford Police Dept., GREGORY TOMLIN, Captain, Stamford Police Dept., JOHN SCALISE, Officer, Stamford Police Dept., LAURIE BRETTHAUER, Officer, Stamford Police Dept., SEAN COONEY, Officer, Stamford Police Dept., DOUGLAS ROBINSON, Officer, Stamford Police Dept.

Defendants-Appellants

KRISTAL WALKLEY, Sergeant, Stamford Police Dept.

Defendant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant(s) Mayer et al.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Mahoney dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judges that hear the appeal and that no such judge has requested that a vote be taken thereon.

APPENDIX D

United States Constitution
Amendment IV

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

No. 94-481

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

LUIS OLIVEIRA, MILTON OLIVEIRA & ELIAS MOREIRO,

Petitioners

v.

GEORGE MAYER, POLICE CHIEF OF CITY OF STAMFORD, CONNECTICUT, GREGORY TOMLIN, JOHN RAINONE, JOHN F. SCALISE, LAURIE BRETTHAUER, SEAN COONEY, AND DOUGLAS ROBINSON,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals of the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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26 pp

QUESTION PRESENTED FOR REVIEW

Did the majority decision of the Second Circuit Court of Appeals (Newman, CJ and Cardamone, J) properly determine that the "reasonableness" of the police officers actions for the purpose of qualified immunity was a question for the jury, after the majority had erroneously affirmed the directed judgment of the trial court that after the police detained the three plaintiffs on suspicion of committing a burglary, a proper Terry stop became an illegal arrest?

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B. STATUTE

42 U.S.C. § 1983 1

STATEMENT OF THE CASE

The Respondents-defendants are police officers who filed a petition for certiorari in the same case as this petition entitled "Mayer, et al v. Oliveira, et al" #94-526. Therefore, the Respondents agree that their Petition for Certiorari should be granted, and that this Petition should be granted, but not for the reasons cited by the Plaintiffs-Petitioners.

Luis Oliveira and two relatives, who are from Brazil and speak Portuguese, sued seven police officers (but not the City of Stamford): Chief of Police George Mayer, Capt. Tomlin (ranking supervisor on the scene) and four individual Police Officers who were on the scene (Bretthauer, Robinson, Cooney, Scalise, and Rainone) under 42 U.S.C. § 1983, for

a 20 minute detention on the Connecticut Turnpike for "possible burglary" on January 4, 1991. The Plaintiffs were pulled over on the Turnpike (I-95), during rush hour, while apparently fleeing to New York. The police responded to a civilian complaint that the Plaintiffs committed a burglary. Because of the nature of the suspected crime, and the hazardous conditions of rush hour traffic on the turnpike, the police used standard "felony" or "high risk" procedures. After the Plaintiffs were exonerated, they were released without arrest. The entire incident (from initial phone call by the civilian complainant, the complainant's following the Plaintiffs' car for 10 minutes from North Stamford to the Connecticut turnpike, to Plaintiffs' release 20 minutes after they

were detained) lasted 33 minutes, according to a computer printout from 911. The Plaintiffs claimed no damages other than fear during the brief detention. Even the plaintiffs' expert agreed that the Stamford police properly stopped the plaintiffs for an "investigative detention" which the trial court and Second Circuit majority erroneously found evolved into a false arrest because of the "felony stop" procedures used.

Even the brief 20 minute detention was caused by the actions of Plaintiffs, not the police. First, the Plaintiffs failed to respond to police commands given on the loudspeaker after they were pulled over an a busy interstate. Second, their alibi that they were filming their work as stonemasons with an expensive

camcorder was suspect as they could not name the street they worked on or the name of the person who paid them for the masonry work they did. As the dissent noted,

> "... detention in this case might have been insignificantly brief but for the plaintiffs' inability to respond to police commands, or provide either the name of the person who employed them for masonry work or the address at which it was performed...[The Plaintiffs'] exculpatory explanation for their presence on the dead end street, the claim that they were building a wall at an address on the street that they could not specify for an employer whom they could not name [were] improbable assertions, especially viewed in the context of the initial complaint, [and] are strongly conducive to a finding of probable cause." (23 F3d 642, dissent at 651; emphasis added).

The trial court and the Second Circuit majority ignored ample evidence that this incident was a reasonable high risk stop, and the "felony stop" procedures were based upon the need for police to defend

themselves and the public; that the police acted consistently with their training; that the police acted properly in using the "felony stop" procedure to investigate a valid civilian complaint of a possible felony, on a crowded interstate in rush hour traffic; that the plaintiffs could, if not detained and restrained, either use a concealed weapon or engage the police in a high speed chase and so endanger other motorists. The majority decision has jeopardized the felony stop procedure, and will endanger the safety of police officers, since "felony stops" may lead to suits for damages if there is no crime. Approaching stopped cars is the second most common cause of death of police officers.

The Court charged the jury that there was a false arrest as a matter of law,

and that no reasonable police officer would have acted as these police officers did, and therefore the jury must find damages for the Plaintiffs. The jury returned a verdict for $60,000 compensatory damages against the individual officers and $15,000 punitive damages against the supervisor, Capt. Tomlin. The Court denied the Defendants' Motion for Judgment N.O.V./New Trial.

After the defendants filed an appeal, the Second Circuit by majority decision (Newman, C.J. and Cardamone, J; Mahoney, J. dissenting) dated April 28, 1994 affirmed the District Court (TFG Daly, J) which found as a matter of law that a Terry stop became an illegal arrest as a matter of law; the Second Circuit remanded only the issue of qualified immunity as a fact-bound decision that

should be determined by a jury. Although the majority properly reversed the trial court on the issue of qualified immunity, it unduly restricted this right since the trial court will inform the jury that, as a matter of law, the defendant police officers falsely arrested the plaintiffs.

Judge Mahoney in his dissent read the record on appeal differently from the majority, and found sufficient evidence for a jury to determine that the Terry stop was proper, and that there was probable cause for the arrest:

> "A reasonable jury could conclude, however, that the plaintiffs' apparent inability to explain their presence in the neighborhood, together with the complainant's report of a suspected burglary, resulted in a police perception of probable cause very early in the course of the plaintiffs' detention. Alternatively, a reasonable jury could conclude that the Terry stop did not evolve into an arrest during the quite limited period when the plaintiffs were detained and the police undertook an investigation that

resulted in the plaintiff's release." (id, at 652; emphasis added).

REASONS FOR DENYING CERTIORARI

The Respondents agree that certification should be granted, but not for the reasons proffered by the Petitioners.

A. Claimed Error of a "Second Look"

The Petitioners claim that the Second Circuit erred when it found as a matter of law that there was a false arrest, but still remanded the case to a jury on the issue of probable cause. The Petitioners also agree with the majority criticism of Anderson v. Creighton, 483 US 635, 643 (1987) that there should be a "second look" that a police officer can reasonably act unreasonably (Petitioner's Brief at pg. 13; Oliveira v. Mayer, 35 F.3rd 642, at 648).

The Respondents agree that the majority decision is erroneous for different reasons: the majority misread the record to find a false arrest, and because the majority's recitation of facts is internally inconsistent. The majority states that the detention took 30 minutes "after the plaintiffs were stopped" (23 F.3d at 644), which distinguishes this from other cases finding that a 20 minute detention did not cause a Terry stop to become an arrest. On the other hand, in footnote 3 at page 650, the majority notes the defendants' version is that the plaintiffs were detained for only 20 minutes. This approach undercuts the majority's statement that the record was viewed in the light most favorable to the defendants in reviewing whether the trial

court properly directed judgment in favor of the Plaintiffs (23 F.3d at 645).

Judge Mahoney, in his dissent, found that there was nothing unconstitutional about the use of standard "felony stop" procedures:

> The "oppressive" elements of the encounter involved, as a majority seems to acknowledge, fairly standard felony stop procedures. If there is a basis to detain a suspect, the detention does not become an arrest simply because the suspects are handcuffed ... Moreover, "a person is not under arrest simply because he is placed in a police patrol car." ... In addition, the relative brevity of the detention argues against the conclusion that there was an arrest ... The detention in this case might have been insignificantly brief but for the plaintiffs' inability to respond to police commands, or provide either the name of the person who employed them for masonry work or the address at which it was performed. And when the plaintiffs' provided the police with a telephone number that would resolve their identification, the person who answered the phone could not speak English. (id, at 651; emphasis added).

The dissent points out the serious error in the analysis of the majority, since it outlaws the use of standard felony stop procedures if in hindsight there is no crime, the first time this has been done by any court of appeals:

> The alternatives are to forgo the Terry stop, or to execute it on the basis of necessarily limited information without taking "felony stop" precautions, and hope for the best. I don't regard either option as a constitutional requirement. (id at 651).

As Judge Mahoney states, the majority engaged in "unrealistic second-guessing" of nationally established police procedure that was discouraged in U.S. v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed.2d 605 (1985).

> In my view, both the district court ruling on liability and the majority opinion in this court constitute unwarranted exercises of

the sort of 20-20 hindsight that Sharpe disparages. (id at 652).

The implications of the majority decision are enormous, as felony stop procedures are now unconstitutional, at least in the Second Circuit.

B. Claimed Error of Remand to the Jury to Determine Qualified Immunity

The Petitioners confuse the caselaw when they argue that the issue of qualified immunity must be determined by the court, and not by a jury.

The Respondents agree that the majority opinion's discussion about "qualified immunity" is in error. The majority discussion about qualified immunity is full of "seeming circularity" and is "especially perplexing" (at pg. 648). But this error is caused by the majority's selective and strained reading of the record in an attempt to justify

the trial court's ruling that, as a matter of law, the police violated the plaintiffs' Fourth Amendment rights (using the forbidden standard of hindsight), and yet the jury could find on remand that the police still acted "reasonably".

The majority explicitly questions the Supreme Court decision in Anderson v. Creighton, 483 US 635, 107 S Ct 3034, 97 L Ed2d 523 (1987) at footnote 2, pg. 649: "With respect, the writer is not wholly persuaded by the Court's explanation [of qualified immunity]..." citing Newman, "Suing the Lawbreakers: Proposals to Strengthen the § 1983 Damage Remedy for Law Enforcers' Misconduct", 87 Yale L.J. 447, 460-1 (1978).

Other courts have adopted this criticism, eg. Edwards v. Cabrera, 861

F.Supp 664, 679 (N.D.Ill. 1994). This is reason alone to grant certification.

It is respectfully submitted that the majority's decision needlessly confused the concept of qualified immunity. The dissent is correct that the majority misread the record, and the facts could support a jury decision that the police acted properly in making a Terry stop, and the use of standard felony stop procedures because of the crowded Turnpike conditions and the felony crime under investigation was proper. The majority decision ignored the evidence favorable to the police in order to constrict the latitude given to the police by the doctrine of qualified immunity, which protects not just the police, but the public. The 20-20 hindsight of the majority would unduly

restrict the "ample room for mistaken judgments" so police don't always err on the side of caution, Hunter v. Bryant, 502 U.S. __, 112 S.Ct. 534, 116 L.Ed.2d 589, 596 (1991); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (officials should be "free from the specter of endless and debilitating lawsuits" especially in investigation of crime, since the ability to protect the public would be chilled if subject to second-guessing); Gramenos v. Jewel Companies, Inc, 797 F.2d 432 (7th Cir. 1986) (an "officer should not risk his career and fortune by believing an apparently sober eyewitness to a crime" at 439).

The majority analysis conflicts with Dempsey v. Town of Brighton, 749 F. Supp. 1215 (W.D.N.Y. 1990), *affirmed* without op'n, 940 F.2 648 (2d Cir.), cert

denied, 112 S. Ct. 338, where summary judgment was granted for the police on claims of false arrest, based upon an investigatory stop with the same "felony-stop" procedures that were used in this case (the public address system was used to order the driver to throw his car keys out; the driver and the passenger were ordered to lie face down on the ground; the officers had their weapons drawn; both driver and passenger were detained for 20 minutes while identification was resolved).

This also conflicts with Courson v. McMillian, 939 F.2d 1479, 1490-1 (11th Cir 1991) (police officer pulled plaintiff's vehicle over because of suspected narcotic involvement near a marijuana field; plaintiff was an innocent female who was released, after

being ordered to lie on the ground with a shotgun aimed at her for 20 minutes).

Here, the majority rejected as unconstitutional a standard police policy that was taught by the State of Connecticut in a training bulletin and which followed a national policy. From now on, the police (at least in the Second Circuit) risk a civil rights lawsuit if they use felony stop procedures and there is no crime. Unlike a recent case where procedures used by the Secret Service were found to have violated the constitution, without any prior ruling, and there was no qualified immunity since "no reasonable officer" would do what was done (allow TV cameras into a residence during the execution of a search warrant); Ayeni v. Mottola, 35 F.3rd 680, 686 (2d Cir. 1994, Newman,

CJ); in Oliveira the police followed standard procedures taught by the State of Connecticut when investigating a suspect felony on a crowded highway.

The majority ignored the comments in Dempsey, id, which conceded that the police have the right to protect themselves, and it is unreasonable for the courts to require police officers to take "unnecessary risk in the performance of their duties ... we would be heartless if we did not share the officers' concern for their own safety ... we cannot impose on law enforcement personnel the Hobson's Choice of keeping their guns holstered when to do so increases a risk that they will be shot", and that car-stop situations are "especially hazardous and support a need for added safeguards". (At pg 1225). The Dempsey court noted that,

based on what had occurred and based on the information that the police had, it may well have been a dereliction of duty for them to have simply let the suspects drive away. (At pg 1228).

While it may be theoretically possible to distinguish the facts in this case from Dempsey, this should be for a jury to decide.

CONCLUSION

The Respondents agree that a petition for certification to review the Second Circuit majority decision should be granted, but not for the reasons stated by the Petitioners. The majority decision eviscerates the concept of qualified immunity. Here police officers responded quickly to a valid citizen complaint, followed their training in using standard felony stop procedures on a crowded

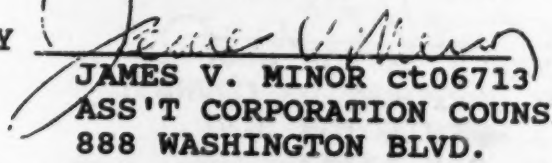
turnpike, and promptly resolved the issue of whether a crime had been committed. The Second Circuit ruled this violated the constitutional rights of the Plaintiffs, rejecting ample evidence favorable to the police, and which the dissent found was convincing enough to be a jury issue. Because the majority misread the record, its decision will create future confusion, as a future jury will be charged on retrial that the police as a matter of law falsely arrested the plaintiffs, although their actions may not be actionable if this "mistake" was reasonable.

The majority decision erred by misreading the record and using 20-20 hindsight to determine the Terry stop evolved into an illegal arrest, rather than allowing a jury to place themselves

in the shoes of the officers at the scene, to determine if they acted properly.

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the Second Circuit in this matter should be granted, not for the reasons suggested by the Petitioners, but rather for the reasons set forth above and in the Respondents' Petition for Cert (#94-526).

THE RESPONDENTS
GEORGE MAYER, ET AL

BY 

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CERTIFICATION

This is to certify that all parties required to be served have been served in accordance with Rule 29: three copies of the foregoing Brief in Opposition have been mailed on November 30, 1994, postage prepaid to:

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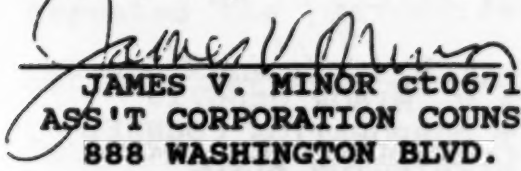

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